

SANCTUARY SCHOOLS IN THE P-20 PIPELINE: POLICIES TO CONSIDER

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President Trump's immigration policies have sparked contentious political, societal, and litigious debates surrounding undocumented immigration and specifically education for undocumented students. In response, many municipalities and college campuses have declared themselves as "sanctuaries"-adopting policies to refuse to collaborate and cooperate with federal immigration officials.¹ This article will: (1) briefly examine the current state of affairs in educational attainment of undocumented students, (2) provide a history of the sanctuary movement, and (3) examine various campus sanctuary policies and their implications. This background forms the foundation to examine the liability and responsibility of colleges and universities in this sanctuary movement.

Educational Attainment of Undocumented Students

The lack of immigration policymaking at the federal level has caused a duality among undocumented youth-some 800,000 young people² have been able to benefit from participating in the Deferred Action for Childhood Arrivals (DACA) program, while others either were not eligible or did not participate because of fear.³ Undocumented youth are often brought to the United States by parents attempting to escape from poverty, violence, devastation from natural disasters, etc.⁴ Undocumented youth are living their lives like any other American children-going to school, playing in the neighborhood, participating in high school activities. Given there has been no legal path for these young people to fully engage in American society, they struggle to engage in education, professional employment, and traveling abroad--things most Americans take for granted.

There are an estimated 11.7 million undocumented immigrants in the United States,⁵ 1.8 to 2.2 million of whom

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are eighteen years old or younger.⁶ Since June 15, 2012, some undocumented youth have been eligible (and were approved) to receive benefits from President Barack Obama's DACA program.⁷ Collectively, for the purposes of this article and for the ease of reading, these young people are considered to be "DREAMers," named after the law that has been introduced approximately a dozen times to resolve this national issue. DREAMers share the need for a comprehensive approach to inclusion in our national fabric through a pathway to legal status and citizenship.

The U.S. Supreme Court first dealt with undocumented students and public education in *Plyler v. Doe*,⁸ where the Court prohibited states from denying undocumented students access to a free K-12 education and prohibited school districts from charging tuition based on citizenship status.⁹ Justice Brennan ruled that this denial of education was a violation of the Fourteenth Amendment's Equal Protection Clause.¹⁰ Specifically, denial of education would create a "lifetime of hardship" and a "permanent underclass" of individuals so that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity to an education."¹¹ As a result, the U.S. Supreme Court afforded all children the opportunity to a K-12 education, regardless of immigration status.¹² Importantly, the Court stressed that the undocumented children "can affect neither their parents' conduct nor their own status,"¹³ and consequently, it would be unfair to penalize the children for their parents' presence.

As undocumented youth matriculate from high school, their status poses challenges as they consider higher education. *Plyler* opens access to primary and secondary education, but a high school diploma is not sufficient to compete in today's economy.¹⁴ Access to higher education is much more *585 uncertain for DREAMers as these young people transition into adulthood and confront various legal, economic, and social barriers related to financial aid and employment opportunities.¹⁵ These challenges continue as DREAMers seek out internships, part-time jobs, and professional positions after graduation that require a Social Security Card.¹⁶ Given the existing barriers to education for undocumented students, upon the election of President Donald Trump, some schools, both K-12 and higher education, declared themselves as sanctuaries to provide a safe learning environment.¹⁷

Sanctuary School Movement

There are approximately 200,000 to 225,000 DREAMers in the U.S.¹⁸ When it became clear that President Trump would enact his policies against DREAMers, students and supporters began to demand that educational institutions declare themselves “sanctuaries” to protect students from President Trump’s planned mass deportations. On November 15, 2016, Portland State University and Reed College became the first post-secondary institutions to declare themselves sanctuary campuses¹⁹ and others followed. Many school districts and college campuses declared themselves as “sanctuaries” as a goal to provide a safe and equitable learning environment for all students, including undocumented and immigrant students who face wrongful detainment and deportation from anti-immigration policies. Below is a sampling of educational institutions that declared themselves as “sanctuaries.”

<u>SAMPLING OF SANCTUARY SCHOOLS</u> ²⁰	
<i>School Districts</i>	<i>College & Universities</i>
Beverly Public Schools (MA) ²¹	City College of San Francisco ²²
Chicago Public Schools ²³	Drake University ²⁴
Des Moines Public Schools ²⁵	Emerson College ²⁶

Las Cruces Public Schools ²⁷	Pitzer College ²⁸
Miami-Dade County Public Schools ²⁹	Portland State University ³⁰
Milwaukee Public Schools ³¹	Queensborough Community College ³²
Newark Public Schools ³³	Reed College ³⁴
Oakland Unified School District ³⁵	San Francisco Art Institute ³⁶
Pittsburgh Public Schools ³⁷	Santa Fe Community College ³⁸
Portland Public Schools ³⁹	Scripps College ⁴⁰
Broward County Public Schools (FL) ⁴¹	Swarthmore College ⁴²
San Francisco Unified School District ⁴³	University of Pennsylvania ⁴⁴
Santa Fe Public Schools ⁴⁵	Wesleyan University ⁴⁶

*586 The preceding image contains the references for 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45 and 46.

*587 “Sanctuary schools” have adopted a policy or set of policies that protect the rights of undocumented and immigrant students; and while each institution has adopted different policies, their declarations, resolutions, and statements have reiterated their support for their students.⁴⁷ For example, Swarthmore *588 College not only declared support for their students but also for their community. This is unique since most institutions only mention their students. There is not one specific policy that schools adopt, but they vary from refusing to voluntarily share information with federal immigration officials, prohibiting physical access to federal immigration officials, to providing distance-learning options for affected students.⁴⁸ Whether or not schools have declared themselves as sanctuaries or not, they still have legal responsibilities to their undocumented and immigrant students to protect their educational records, among other rights.⁴⁹

Policies Considered by Sanctuary Schools

While institutions have adopted varying policies, below is a sampling of policies that sanctuary campuses have adopted to reiterate their support for DREAMers.

<u>SAMPLING OF SANCTUARY SCHOOL POLICIES</u> ⁵⁰
• Refusing to voluntarily share information with federal immigration officials to the fullest extent of the law
• Refusing physical access for federal immigration officials to any and all school - owned land and facilities to the fullest extent of the law

<ul style="list-style-type: none"> • Prohibiting campus police from: inquiring about an individual’s immigration status, enforcing immigration laws, intimidating undocumented activists and protests, and/or participating with federal immigration officials in immigration-related actions
<ul style="list-style-type: none"> • Refusing to use the federal government e-verify system⁵¹
<ul style="list-style-type: none"> • Prohibiting discrimination in housing based on immigration status
<ul style="list-style-type: none"> • Supporting DREAMers’ equal access to enrollment, in-state tuition, financial aid, and scholarships
<ul style="list-style-type: none"> • Continuing to advocate for and support of the DACA program through lobbying policy- and lawmakers
<ul style="list-style-type: none"> • Requiring all contractors and subcontractors of the schools to agree and abide by to the institutional sanctuary policies
<ul style="list-style-type: none"> • Providing distance-learning options for affected students
<ul style="list-style-type: none"> • Providing legal assistance to impacted students

*589 The preceding image contains the references for 50 and 51.

Schools’ Continued Legal Responsibilities

Whether schools declare themselves as sanctuaries or not, they continue to have legal responsibilities to their students. The Federal Educational Rights and Privacy Act (FERPA) is a federal law that applies to all primary, secondary, and postsecondary schools that receive federal funding through programs administered by the U.S. Department of Education, such as federal financial aid.⁵² Under FERPA, educational institutions must protect “educational *590 records,”⁵³ which is broadly defined to include records and information that are “directly related to the student” and “maintained by an educational agency or institution.”⁵⁴ Undocumented status is usually voluntarily disclosed by students on applications during the admissions or financial aid process, which makes this information and those records subject to protection under FERPA.⁵⁵ Unless students consent to the release of this information, if it is considered “directory information,”⁵⁶ or if there is a court order or any other exceptions under FERPA,⁵⁷ the law prohibits the disclosure of student information and records without their consent.⁵⁸ As a result, educational institutions should not release students’ immigration status to Immigration and Customs Enforcement (ICE) or any other federal agency, unless directed by a lawful judicial order. Even if the school has been presented with an order for a student’s immigration status, the school should make reasonable efforts to notify the student of the order and inform the student that the information may be disclosed.⁵⁹

It is also critical that institutional staff handling public records requests are properly trained to secure student privacy. Interpretation of policy and procedure may vary among staff members, especially if training is lacking in specificity. One human error that leaks immigration information with identifiers to immigration officials may be detrimental to the educational attainment of a student. As such, institutions should consider funneling public records requests either to their legal counsel or to a specified and trained individual to ensure the utmost protection of student privacy.

Schools should also limit immigration enforcement on campus and preserve a safe learning environment for students. On October 24, 2011, the U.S. Immigration and Customs Enforcement (ICE) issued a memorandum instructing field office directors that no enforcement actions were to occur at, and were not to be focused on, schools (pre-schools, primary, secondary, and post-secondary), hospitals, funeral sites, weddings or other

religious ceremonies, protests, and churches.⁶⁰ While the memorandum is not binding law, it does provide critical guidance that immigration enforcement actions are not to occur around or on school campuses. While the guidance has not been ***591** modified, in practice ICE has pushed the limits by arresting parents after dropping children off at school, among other instances.⁶¹ Judicial officers have even petitioned for courthouses to be added to the Sensitive Locations list as ICE has been arresting immigrants appearing for court hearings.⁶²

Depending on where the enforcement action is taking place, a warrant may or may not be required. The greater the expectation of privacy from the student, the more likely a warrant is required.⁶³ Schools may request that ICE obtain a warrant and show this warrant to a school official before entering campus. Such a policy can be crafted and facilitated by local police with immigration agencies. School police and security forces should be on alert to potential immigration enforcement actions in order to intervene and ensure various constitutional rights of its students are protected, such as 4th Amendment protection against unreasonable search and seizure, and 14th Amendment protection of property and liberty interests, due process, and equal protection.

Sanctuary school policies are designed to provide a safe space for students to learn and resist. A safe space is an “environment in which students are willing and able to participate and honestly struggle with challenging issues.”⁶⁴ The creation and protection of these safe spaces for students have been shown to be impactful to the educational attainment of students, especially low-income, first-generation, and ethnic minority students.⁶⁵ Scholars in varying disciplines have found the importance of safe spaces to facilitate student engagement and improve academic outcomes.⁶⁶ ***592** Safe spaces, as a result of a sanctuary declaration, can encompass multiple purposes, such as affirming spaces, therapeutic spaces, supportive spaces, and empowering spaces.⁶⁷ By declaring their school a sanctuary school, or by overtly declaring support and implementing sanctuary-like policies, leaders are creating and supporting these various spaces for their DREAMers to learn, live, and thrive. The various sanctuary school policies mentioned above serve students to make schools places of affirmation, therapy, support, and empowerment by allowing students to continue their education and openly protest, resist, and address their concerns.

Concluding Recommendations

The declaration by a school or college/university campus to become a sanctuary is political, and the outcomes can vary based on the geographic location of the school.⁶⁸ As a result, educational leaders should carefully think through the implications of such a declaration. However, a sanctuary school declaration can be advantageous for educational institutions to create safe zones for their undocumented and immigrant students. By adopting some of the above policies, it is an affirmative statement of support for a marginalized population. The use of the word “sanctuary” allows for the educational institution to join a national movement of more than 200 school districts and college campuses.⁶⁹ However, just adopting policies is not enough. The implementation of these policies is critical.

When considering adoption of a resolution to become a sanctuary, educational institutions and their leaders should consider the following:

1. Conduct research to examine potential implications of a sanctuary declaration, such as state appropriations and/or state and local political support for school and campus initiatives.
2. Reach out to counterparts at other school districts and/or college campuses to learn about their experiences with their sanctuary declaration.
3. Involve and include a wide array of stakeholders, such as students, families, faculty, staff, community members, and business leaders to build support for a resolution.
4. Prepare and outline administrative procedures for faculty and staff to implement and follow policies that will protect students.

5. Train faculty and staff to ensure that all employees are aware of the procedures and the implications of the resolution. This training may also require cultural competency training if employees have not been extensively exposed to this issue previously.

6. Gather supporters to issue a strong public announcement to students, families, and the community.

***593** 7. Be clear with the public about the purpose and goals of the declaration; be clear about what the school or campus can and cannot do as a result of the declaration and existing state and federal laws.

8. Set up a system to monitor the implementation of these policies and record instances that have utilized the new policies to protect students so that administration can evaluate and assess the policy changes.

Footnotes

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- ² Jens Manuel Krogstad, *DACA has shielded nearly 790,000 young unauthorized immigrants from deportation*, PEW RES. CTR. (Sept. 1, 2017), available at <http://www.pewresearch.org/fact-tank/2017/09/01/unauthorized-immigrants-covered-by-daca-face-uncertain-future/>.

- ³ Jeanne Batalova, Sarah Hooker, Randy Capps, James D. Bachmeier, & Erin Cox, *Deferred Action for Childhood Arrivals at the One-Year Mark: A Profile of Currently Eligible Youth and Applicants*, 8 MIGRATION POLICY INST. 1-16, (2013) (criteria and processes to be DACAmented likely exclude certain undocumented youth). See also Tom K. Wong, Angela S. García, Marisa Abrajano, David FitzGerald, Karthrick Ramakrishnan, & Sally Le, *Undocumented No More*, CTR. AMER. PROG. (Sept. 20, 2013), available at <https://www.americanprogress.org/issues/immigration/reports/2013/09/20/74599/undocumented-no-more/> (during the first year implemented, only 61% of eligible undocumented youth applied for DACA; 98% of those processed applications were approved).

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⁷ *See* Krogstad, *supra* note 3.

⁸ 457 U.S. 202, 4 Ed.Law Rep. 953 (1982).

⁹ *Id.* at 230.

¹⁰ *Id.* at 210, 215.

¹¹ *Id.* at 223.

¹² *Id.* at 230.

¹³ *Id.* at 220.

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- ¹⁵ See generally Leisy J. Abrego, “I Can’t go to College Because I Don’t Have Papers:” *Incorporation Patterns of Latino Undocumented Youth*, 4 LATINO STUD. 212 (2006). See also Emily Greenman & Matthew Hall, *Legal Status and Educational Transitions for Mexican and Central American Immigration Youth*, 91 SOCIAL FORCES 1475 (2013).
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- ¹⁷ See David Hòa Khoa Nguyen, *Nativism in Immigration: The Racial Politics of Educational Sanctuaries*, 19 U. MD. L.J. RACE RELIG. GENDER & CLASS 102, 117-120 (2019) (introducing the topic of educational sanctuaries and its roots from Biblical times to the present day and its purpose to provide safe spaces for those marginalized or persecuted).
- ¹⁸ See generally Kaitlin Mulhere, *Undocumented and Stressed*, INSIDE HIGHER ED (Jan. 26, 2015, 3:00 AM), <https://www.insidehighered.com/news/2015/01/26/study-finds-undocumented-colleges-students-face-unique-challenges>.
- ¹⁹ See Elliott Young, *Sanctuary in Name Only*, OR. HUMANITIES (Apr. 5, 2017), <https://oregonhumanities.org/rll/magazine/carry/sanctuary-in-name-only/>.

- ²⁰ Xavier Maciel, *Sanctuary Campuses*, https://www.google.com/maps/d/u/0/viewer?mid%271LcIME474-IYWbTf_xQChIhSSN30%26hl%27en%26ll%2736.203979744343438-113.89148150000005%26z%273 (last visited Jan. 7, 2017).
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²⁹ Kyra Gurney, *Miami Schools Vote to Protect Undocumented Immigrants, Refugees* (Mar. 15, 2017), <https://www.miamiherald.com/news/local/education/article138758253.html>.

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⁴⁹ See Nguyen, *supra* note 47.

⁵⁰ See generally Ward, *supra* note 48.

⁵¹ E-verify is a web-based program through the United States Department of Homeland Security and the United States Citizenship and Immigration Services to help employers confirm the eligibility of their employees to work in the U.S. See U.S. Department of Homeland Security and USCIS, *E-Verify*, available at <https://www.e-verify.gov>.

⁵² 20 U.S.C. § 1232(g) (2013); see also U.S. Dep't of Educ., *Family Educational Rights & Privacy Act*, <https://ed.gov/policy/gen/guid/fpco/ferpa/index.html?src=rn>.

⁵³ 34 C.F.R. § 99.3 (1988).

⁵⁴ *Id.*

⁵⁵ See *id.*

⁵⁶ Directory information is information in a student's educational record that would not generally be

considered to be harmful to the student if disclosed. *See generally* U.S. Department of Education, *FERPA: What is Directory Information* (Accessed on Aug. 12, 2019), available at <https://www2.ed.gov/policy/gen/guid/fpco/faq.html#q4>.

⁵⁷ *Id.* (Under FERPA, there are a number of exceptions that allow schools to share personally identifiable information without the students' consent. These exceptions are: (1) if school officials have legitimate educational interest; (2) transferring school; (3) for audit or evaluation purposes; (4) financial aid purposes; (5) for research purposes; (6) accreditation bodies; (7) complying with a court order; (8) for health and safety purposes; (9) state and local authorities pursuant to state law.)

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⁵⁹ 20 U.S.C. § 1232g(a)(5)(B) (2013).

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⁶² *See generally* Matthew S. Schwartz, *Judges Ask ICE to Make Courts Off Limits to Immigration Arrests*, NAT'L PUBLIC RADIO (Dec. 13, 2018), available at <https://www.npr.org/2018/12/13/676344978/judges-ask-ice-to-make-courts-off-limits-to-immigration-arrests>.

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⁶⁵ Vinay Harpalani, *"Safe Spaces" and the Educational Benefits of Diversity*, 13 DUKE J. CON. L. & PUB. POL'Y 17 (2017), available at <https://ssrn.com/abstract=2942980>.

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